In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 627

ALBERT AGOBIAN AND ALBERT EGISHIAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 15-20) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered October 16, 1963. The petition for a writ of certiorari was filed November 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether this Court should reconsider its rulings upholding the validity of the presumption in 21 U.S.C. 174 arising from possession of narcotics.

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of California of the transportation and concealment of heroin and each was sentenced to imprisonment for ten years. On appeal the convictions were affirmed.

The sole question raised in the petition for a writ of certiorari is the validity of the statutory presumption arising from possession of narcotics, embodied in 21 U.S.C. 174.

ARGUMENT

The statutory presumption here involved, that proof of possession of narcotics, unexplained, will support a conviction for transportation and concealment of unlawfully imported narcotics, was upheld more than thirty years ago in *Yee Hem* v. *United States*, 268 U.S. 178, and was sustained on a more limited challenge to its scope in *Roviaro* v. *United States*, 353 U.S. 53, 63, n. 14. The presumption was also expressly recognized in *Harris* v. *United States*, 359 U.S. 19. This Court has repeatedly declined to reconsider its rulings with respect to the validity of the presumption, although recently asked to do so. *Jennings* v. *United States*, certiorari denied, 374 U.S.

856; see *Maestas* v. *United States*, (311 F. 2d 457), certiorari denied, 372 U.S. 936; *Sumpter* v. *United States* (309 F. 2d 536), certiorari denied, 373 U.S. 953. See also *United States* v. *Savage*, 292 F. 2d 264 (C.A. 2), certiorari denied, 368 U.S. 880; *United States* v. *Holmes*, 187 F. 2d 222 (C.A. 7), certiorari denied, 341 U.S. 948; *Stein* v. *United States*, 166 F. 2d 851 (C.A. 9), certiorari denied, 334 U.S. 844. It has likewise declined to review decisions upholding the more recently created presumption of illegal importation of marihuana (21 U.S.C. 176a) as against a contention that the inference arising from possession is less rational in the case of marihuana than with respect to opium. *Caudillo* v. *United States*, 253 F. 2d 513 (C.A. 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931; *United States* v. *Taylor*, 266 F. 2d 310 (C.A. 7), certiorari denied, 361 U.S. 853. There is no reason now for reconsideration of this settled line of decisions.

Petitioners' argument that the presumptions violate the self-incrimination clause of the Fifth Amendment was laid to rest in *Yee Hem*. The fact that no inferences are to be drawn from the failure of a defendant to take the stand does not mean that uncontradicted evidence by the government must be disregarded; every time the government makes out a *prima facie* case of guilty, a defendant who does not offer testimony will be at a disadvantage. As this Court said in *Yee Hem*, 268 U.S. at p. 185:

> The statute compels nothing. It does no more than to make possession of the prohibited article

> *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

There is no proper anology to the ruling of the Ninth Circuit in *Russell* v. *United States*, 306 F. 2d 402, involving 26 U.S.C. 5841, punishing failure to register a firearm, for there the very act of registering would necessarily require disclosure of illegal past conduct or present status. That deficiency does not exist here. The present statute compels no declaration which imports criminality. The government must prove possession beyond a reasonable doubt before the presumption can arise.

In *Tot* v. *United States*, 319 U.S. 463, this Court laid down as the governing test for the validity of a presumption whether there is a "rational connection between the fact proved and the ultimate fact presumed" (319 U.S. at pp. 467-468). It held that "where

the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." In view of the ever tightening controls on the narcotic traffic, the statutory inference arising from possession is now more closely related "to the circumstances of life as we know them" than it was thirty years ago. This is particularly true with respect to heroin; neither lawful importation nor lawful use of the drug is now possible.[1] Today, at least, the possessor of heroin may be assumed to know that it was imported illegally, and it is reasonable to suppose that he acquired it unlawfully. The presumption is therefore a rational one.

[1] 18 U.S.C. 1402 and 21 U.S.C. 173. The only legal use would be the minute amount permitted for scientific research. See 18 U.S.C. 1402. A recent decision of the Ninth Circuit referred to in the opinion below *(Erwing v. United States)* held the presumption unreasonable as applied to cocaine hydrochloride which is manufactured in the United States and used for medical purpose and as to which there was no proof in the record that the drug is imported.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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